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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
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9 RICHARD LEROY MORGAN,
10

11 *Petitioner,*

12 vs.

13 MICHAEL BUDGE, *et al.*,

14 *Respondents.*

3:05-cv-00661-JCM-RAM

ORDER

15
16 This represented habeas matter under 28 U.S.C. § 2254 comes before the court for
17 a decision on the merits of the single exhausted claim that remains.

18 ***Background***

19 Petitioner Richard Morgan seeks to set aside his 2003 Nevada state conviction,
20 pursuant to a jury verdict, of one count of trafficking in a controlled substance, to wit,
21 approximately 34 grams of cocaine or a mixture containing cocaine. In the sole exhausted
22 ground that remains for decision, ground 11, petitioner alleges that he was denied effective
23 assistance of counsel when appellate counsel failed to argue on direct appeal that the
24 arresting officer did not have reasonable suspicion to stop his vehicle for the headlights not
25 being on at night because the daytime running lights were on.

26 The court summarizes below the evidence presented at the suppression hearing in the
27 state district court. The court makes no credibility findings or other factual findings regarding
28 the truth or falsity of the evidence presented in the state courts, and it summarizes the

1 evidence solely as background to the issue presented in this case. No statement of fact in
 2 describing testimony constitutes a finding of fact or credibility determination by this court.
 3 Further, the court does not summarize all of the evidence presented in the state courts. The
 4 court instead summarizes the evidence pertinent to the petitioner's particular claim.

5 Officer Jason Stallcop testified as follows at the preliminary hearing:

6 At approximately 8:55 p.m. on February 21, 2001, Officer Stallcop was on patrol in a
 7 marked unit in the downtown area of Reno, Nevada, at approximately Fourth and Virginia
 8 Streets. It was dark, and there were no casinos in the immediate vicinity. While proceeding
 9 eastbound on Fourth Street between Virginia and Center Streets, he saw a Suzuki SUV
 10 heading westbound on Fourth Street with no headlights on. Officer Stallcop flashed the
 11 headlights on his police cruiser in an attempt to prompt the other driver to turn on the Suzuki
 12 vehicle's headlights. The other driver did not do so. In the officer's experience, failure to turn
 13 on headlights and failure to use turn signals were leading bases for stops culminating in
 14 arrests for driving under the influence (DUI). The officer turned his vehicle around and made
 15 a traffic stop.¹

16 Richard Morgan was driving the vehicle, which belonged to another person. When
 17 Officer Stallcop told Morgan that he was pulling him over for not using his headlights, Morgan
 18 reached down and turned the headlights on. Morgan then asked Stallcop, "Are the headlights
 19 on now?" The officer told him that he would look after he completed the stop.²

20 Morgan gave Officer Stallcop a California identification card rather than a driver's
 21 license. When Officer Stallcop ran Morgan's information through the computer system, he
 22 found that Morgan's driver's license had been suspended/revoked for failure to pay fines. He
 23 further found that Morgan had a history of failure to pay fines and failure to appear. Officer
 24 Stallcop therefore proceeded to arrest Morgan rather than issue a misdemeanor citation. The
 25 officer did so per police department general orders, given Morgan's prior failures to pay fines,

26
 27 ¹#17-8, Ex. 25, at 4-7 & 11-15.

28 ²*Id.*, at 9-10, 15-16 & 21-22.

1 his prior failures to appear, the fact that Morgan then was driving without a license, and his
2 lack of a Reno address or any proof of employment.³

3 After Morgan stepped out of the vehicle, Officer Stallcop looked at the headlights and
4 they were on. The headlights were not on when he stopped the vehicle. Prior to the stop, the
5 officer saw no driving lights or other lights being turned on. Stallcop testified, as to forward-
6 facing lights, "At encounter of his Suzuki, I saw no white lights at all."⁴

7 During the initial intake search at the jail, officers found the cocaine upon which the
8 drug trafficking charge was based.⁵

Richard Morgan testified as follows in regard to the basis for the initial stop:

According to Morgan, he had the headlights on prior to the stop. According to Morgan, the vehicle was a Suzuki Samurai Sport SUV or jeep. Based upon Morgan's review of the vehicle's owner's manual at some time subsequent to the stop and arrest, it was his understanding that the vehicle's daytime running lights would come on as soon as the vehicle was started. He testified that he believed that the headlights on the vehicle were working, based upon the police tow sheet allegedly not indicating that any lights were out, as well as upon his having looked at the lights on a prior occasion.⁶

17 Morgan acknowledged on cross-examination that he had a prior felony conviction in
18 California for possession of rock cocaine.⁷ The state district court examined Morgan
19 extensively regarding numerous inconsistencies in his statements to various official personnel
20 about where he lived, how long he had lived there, his recent employment history, and his

³#17-8, Ex. 25, at 7-9, 16-20 & 22-25.

⁴Id., at 10-11 & 12-14.

⁵See *id.*, at 9.

⁶*Id.*, at 25-30, 32-34, 38-40 & 43; see also *id.*, at 37 (testimony by Morgan on cross-examination that he read the owner's manual "a couple of times before I even drove the car").

⁷ *Id.*, at 34.

1 drug and alcohol usage.⁸

2 Defense counsel attached with the motion to suppress two sworn affidavits from an
3 engineer with the legal office of what was described as the American Suzuki Motor
4 Corporation along with a copy of the owner's manual for the vehicle.

5 Suzuki Senior Engineer Alex Butt attested that the vehicle was a 1997 Suzuki Sidekick
6 Sport. Butt further attested that the vehicle, as standard equipment, "was equipped with
7 'daytime running lamps', illuminating the headlamps when the engine is started."⁹

8 The pertinent portion of the vehicle owner's manual stated as follows regarding use of
9 the control lever on the outboard side of the steering column to operate the vehicle's lights:

10 **Lighting Operation**

11 To turn the lights on or off, twist the knob on the
12 end of the lever. There are three positions: in the
13 "OFF" position all lights are off; in the middle
14 position the front parking lights, tail-lights, license
plate light, and instrument lights are on, but the
headlights are off; in the third position the
headlights come on in addition to the other lights.¹⁰

15 The manual further stated as follows with regard to the daytime running lights:

16 **Day time Running Light (D.R.L.) System
(If Equipped)**

17 The headlights light, but are dimmer than the low
18 beam, when the following three conditions are all
19 met. Also, the D.R.L. indicator light on the
instrument panel comes on.

20 Conditions for D.R.L. system operation:

- 21 1. The engine is running.
2. The parking brake is released.
3. The light switch is at either the "OFF" or the
"middle" position.

22 **NOTE:**

23 *Be sure to turn the lighting switch to the third
position at night or at any time of the day when
driving or weather conditions require the headlights*

26 ⁸#17-8, Ex. 25, at 43-52; see also *id.*, at 52-54 (redirect).

27 ⁹#17-5, Ex. 17, Exhibits "B" & "C" thereto. Morgan had said that the vehicle was a Samurai.

28 ¹⁰#17-5, Ex. 17, Exhibit "D" thereto.

1 *to operate at full brightness and the taillights to be
2 on.¹¹*

3 After receiving the above-described testimony from Officer Stallcop and Morgan, and
4 having reviewed the above exhibits, the state district judge asked the prosecutor, pointedly,

5 . . . I have just one question for you: How could this vehicle's
6 lights not have been on?¹²

7 During the discussion of the issue, the judge asked further questions of Officer
8 Stallcop, who still would have been under oath. The judge asked Stallcop directly "did you
9 notice whether the daylight running lights were on or was it obvious to you there were no
10 lights, period?" Officer Stallcop testified that he was familiar with daytime running lights, as
11 he had them on both of his vehicles. He testified without equivocation that "I didn't notice any
12 lights at all" on the Suzuki. He acknowledged, in response to the court's questioning, that if
13 he had seen daytime running lights, he might still have made the stop because that is not
14 sufficient lighting for night driving. He acknowledged that he was "aware of the distinction
15 between observing daytime running lights in the evening and no headlights in the evening,"
16 and he reaffirmed that he did not see any forward lights being on prior to the stop.¹³

17 Officer Stallcop further testified during the exchange with the judge that, with regard
18 to the police tow sheet "where it says 'headlights,' the only thing we're looking for on there is
19 not functioning of the lights, we're looking for cracked – a cracked headlight for say the tow-
20 truck driver smashes a headlight, I wanted to make sure that it was not functioning but the
21 headlight was intact."¹⁴

22 ////

23 ¹¹#17-5, Ex. 17, Ex.t "D" thereto (underline emphasis added, remaining emphasis in original).

24
25 ¹²#17-8, Ex. 25, at 57. See also *id.*, at 57-60 (the judge discusses in detail the operation of the
26 vehicle's lighting system as it related to the testimony presented).

27 ¹³#17-8, Ex. 25, at 60-61.

28 ¹⁴*Id.*, at 61.

1 During the course of the oral argument on the motion, the judge further stated,

2 No, I can't place any credence on the defendant's
3 testimony. I don't think he's a credible witness. . . .¹⁵

4 The judge thus focused upon what the exhibits signified.¹⁶

5 The state district court thereafter denied the motion to suppress in a short written order
6 that did not expressly articulate the court's underlying reasoning.¹⁷

7 Following the jury trial and conviction, Morgan, through counsel, pursued a direct
8 appeal. Appellate counsel challenged the state district court's denial of the motion to
9 suppress only on the ground that the arresting officer abused his discretion, once the stop
10 was made, in arresting Morgan rather than issuing a misdemeanor citation.¹⁸ Appellate
11 counsel did not challenge the basis for the initial stop. Counsel noted that, given Officer
12 Stallcop's testimony that he would have made the stop even if the daytime running lights were
13 on, "it would appear that with or without them the officer had probable cause to at least make
14 the initial stop."¹⁹

15 Morgan, acting *pro se*, thereafter sought to file, *inter alia*, a supplemental fast track
16 statement in which he sought to challenge the basis for the initial stop. Morgan urged that the
17 officer did not have probable cause for the stop because, pursuant to the vehicle owner's
18 manual, the daytime running lights necessarily would have been on, rendering the stated
19 basis for the stop, the headlights being off, pretextual.²⁰

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23 ¹⁵#17-8, Ex. 25, at 58-59.

24 ¹⁶*Id.*

25 ¹⁷#17-9, Ex. 26.

26 ¹⁸#18-5, Ex. 59a, at electronic docketing pages 8-11.

27 ¹⁹*Id.*, at electronic docketing page 9, n.9.

28 ²⁰#18-5, Ex. 59c.

1 In a published opinion, the Supreme Court of Nevada rejected the argument presented
 2 by appellate counsel that the police officer's post-stop arrest was arbitrary or unreasonable.²¹
 3 In a footnote, the state supreme court stated that “[w]e have reviewed all documents that
 4 Morgan has submitted in proper person to the clerk of this court in this matter, and we
 5 conclude that no relief based upon these submissions is warranted.”²² The court expressly
 6 declined, however, to consider any claims or facts presented by Morgan that were not
 7 presented in the district court proceedings.²³

8 On Morgan's subsequent state post-conviction petition, counsel was appointed for the
 9 petitioner.²⁴ Morgan, through post-conviction counsel, acknowledged that all but one of the
 10 *pro se* claims in the state petition were subject to dismissal. Thereafter, Morgan pursued only
 11 a single post-conviction claim that he had been denied effective assistance of counsel on the
 12 direct appeal because appellate counsel failed to argue that the arresting officer did not have
 13 reasonable suspicion to make the initial stop.²⁵

14 In the state district court, petitioner maintained that “[a]t the suppression hearing,
 15 Morgan demonstrated that the vehicle he occupied had functional daytime running lights that
 16 were on when he was contacted by the officer.” Morgan contended that the State therefore
 17 had failed to establish that the officer had specific articulable facts upon which to base
 18 reasonable suspicion, and that the weight of the evidence supported his claim that the stop
 19 was pretextual. He asserted that appellate counsel therefore provided ineffective assistance
 20 in failing to pursue the issue on direct appeal.²⁶

21 The state district court rejected this claim on the following grounds:

22
 23 ²¹ See *Morgan v. State*, 120 Nev. 219, 88 P.3d 837 (2004)(also filed at #18-6, Ex. 62).

24 ²² 120 Nev. at 222 n.9, 88 P.3d at 839 n.9.

25 ²³ *Id.*

26 ²⁴ #19-2, Ex. 80.

27 ²⁵ #19-2, Ex. 82.

28 ²⁶ *Id.*

1 During the hearing on the motion to suppress, the Court
 2 extensively inquired about the possibility that daytime lights were
 3 running when the police officer stopped the vehicle. The officer
 4 testified that, to his recollection, the car had no headlights
 5 running. However, even if the daytime lights were on, he testified
 6 that he would still make the stop because such daytime lights
 7 were not sufficient lighting for night. Regardless of whether the
 8 daytime beams were on, the Court found that the difference
 9 between the daytime and nighttime brightness of the beams would
 10 give the officer reasonable suspicion to stop Petitioner as he was
 11 violating a traffic law.

7 The Court finds that Petitioner's appellate counsel did not
 8 offer ineffective assistance of counsel. But for appellate
 9 counsel's failure to raise this issue on appeal, there is not a
 10 reasonable probability that the outcome would have been
 11 different. The Court denied the motion to suppress as it found
 12 the police officer could point to the reasonably articulated facts as
 13 to why he stopped and eventually detained Petitioner. . . . The
 14 Court had the discretion to weigh the evidence presented by the
 15 Petitioner and the arresting police officer.²⁷

12 On the state post-conviction appeal, Morgan's counsel expanded the argument to
 13 include a contention that he could demonstrate ineffective assistance of appellate counsel in
 14 failing to raise the issue on direct appeal because the denial of the motion to suppress could
 15 have been overturned on the ground that the State failed to establish that the daytime running
 16 lights did not provide sufficient illumination to satisfy the requirements of N.R.S. 484.587.²⁸

17 In an October 5, 2005 order, the Supreme Court of Nevada rejected the petitioner's
 18 claim of ineffective assistance of appellate counsel on the following grounds:

19 . . . In his post-conviction petition, Morgan argues that
 20 appellate counsel should have also challenged the propriety of
 21 the traffic stop and the district court's finding that Reno Police
 22 Officer Jason Stallcop had reasonable suspicion to stop and
 23 detain him. We disagree with Morgan's contention.

24 . . .
 25 At the pretrial suppression hearing, Officer Stallcop
 26 testified that he initiated the traffic stop after observing Morgan
 27 driving a vehicle at night with the lights off. When Officer Stallcop
 28 approached Morgan on foot after the stop, he testified that --

²⁷#19-3, Ex. 84, at 2.

²⁸#19-3, Ex. 91, at 4-7.

1 I told him that I was pulling him over for no
 2 headlights, and he reached down in front of me and
 3 turned the headlights on and asked me, 'Are the
 4 headlights on now?' I told him I would let him know
 5 after the stop.

6 . . .

7 I physically saw him turn down and grab the switch
 8 and turn it on.

9 Morgan contradicted the testimony of Officer Stallcop at the
 10 suppression hearing. Morgan stated that the vehicle's lights were
 11 illuminated when he was stopped. Morgan also stated the jeep
 12 was "equipped with daytime running lamps where even if I didn't
 13 turn the lights on, the headlights illuminate as soon as you turn
 14 the car on." Morgan argued that if the vehicle's lights were on,
 15 then Officer Stallcop did not have the requisite "probable cause"
 16 to initiate a traffic stop. The district court, however, stated that it
 17 could not "place any credence on [Morgan's] testimony. I don't
 18 think he's a credible witness." On October 22, 2002, the district
 19 court entered an order denying Morgan's motion to suppress.

20 We conclude that the district court did not err in rejecting
 21 Morgan's claim of ineffective assistance of appellate counsel.
 22 "On matters of credibility, this court will not reverse a trial court's
 23 finding absent clear error." Morgan has failed to demonstrate that
 24 the district court clearly erred in determining that Officer Stallcop's
 25 testimony was more credible than his, or that the district court's
 26 finding was not supported by substantial evidence. Further,
 27 Morgan has failed to demonstrate that the district court erred in
 28 finding that his claim did not have a reasonable probability of
 29 success on appeal.²⁹

Governing Law

30 The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a "highly
 31 deferential standard for evaluating state-court rulings." *Lindh v. Murphy*, 521 U.S. 320, 117
 32 S.Ct. 2059, 2066 n.7(1997). Under this deferential standard of review, a federal court may not
 33 grant habeas relief merely on the basis that a state court decision was incorrect or erroneous.
 34 See *Clark v. Murphy*, 331 F.3d 1062, 1068 (9th Cir. 2003). Instead, under 28 U.S.C. §
 35 2254(d), the federal court may grant habeas relief only if the decision: (1) was either contrary
 36 to or involved an unreasonable application of clearly established law as determined by the
 37 United States Supreme Court; or (2) was based on an unreasonable determination of the
 38

29 #19-4, Ex. 96, at 2-4 (record citation and authority citation footnotes omitted).

¹ facts in light of the evidence presented at the state court proceeding. See *Mitchell v. Esparza*, 540 U.S. 12, 15, 124 S.Ct. 7, 10, 157 L.Ed.2d 263 (2003).

3 A state court decision is “contrary to” law clearly established by the Supreme Court only
4 if it applies a rule that contradicts the governing law set forth in Supreme Court case law or
5 if the decision confronts a set of facts that are materially indistinguishable from a Supreme
6 Court decision and nevertheless arrives at a different result. See *Mitchell*, 540 U.S. at 15-16,
7 124 S.Ct. at 10. A state court decision is not contrary to established federal law merely
8 because it does not cite the Supreme Court’s opinions. *Id.* Indeed, the Supreme Court has
9 held that a state court need not even be aware of its precedents, so long as neither the
10 reasoning nor the result of its decision contradicts them. *Id.* Moreover, “[a] federal court may
11 not overrule a state court for simply holding a view different from its own, when the precedent
12 from [the Supreme] Court is, at best, ambiguous.” *Mitchell*, 540 U.S. at 16, 124 S.Ct. at 11.
13 For, at bottom, a decision that does not conflict with the reasoning or holdings of Supreme
14 Court precedent is not contrary to clearly established federal law.

15 A state court decision constitutes an “unreasonable application” of clearly established
16 federal law only if it is demonstrated that the court’s application of Supreme Court precedent
17 to the facts of the case was not only incorrect but “objectively unreasonable.” See *Mitchell*,
18 540 U.S. at 18, 124 S.Ct. at 12; *Davis v. Woodford*, 333 F.3d 982, 990 (9th Cir. 2003).

19 To the extent that the state court’s factual findings are challenged intrinsically based
20 upon evidence in the state court record, the “unreasonable determination of fact” clause of
21 Section 2254(d)(2) controls on federal habeas review. *Lambert v. Blodgett*, 393 F.3d 943,
22 972 (9th Cir. 2004). This clause requires that the federal courts “must be particularly
23 deferential” to state court factual determinations. *Id.* The governing standard is not satisfied
24 by a showing merely that the state court finding was “clearly erroneous.” 393 F.3d at 973.
25 Rather, the AEDPA requires substantially more deference:

26 . . . [I]n concluding that a state-court finding is unsupported by
27 substantial evidence in the state-court record, it is not enough that
28 we would reverse in similar circumstances if this were an appeal
from a district court decision. Rather, we must be convinced that

1 an appellate panel, applying the normal standards of appellate
 2 review, could not reasonably conclude that the finding is
 supported by the record.

3 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); see also *Lambert*, 393 F.3d at 972.

4 If the state court factual findings withstand intrinsic review under this deferential
 5 standard, they then are clothed in a presumption of correctness under 28 U.S.C. § 2254(e)(1),
 6 and they may be overturned based on new evidence offered for the first time in federal court,
 7 if other procedural prerequisites are met, only on clear and convincing proof. 393 F.3d at 972.

8 On a claim of ineffective assistance of counsel, the petitioner must satisfy the two-
 9 pronged test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674
 10 (1984). He must demonstrate that: (1) counsel's performance fell below an objective standard
 11 of reasonableness; and (2) counsel's defective performance caused actual prejudice. On the
 12 performance prong, the issue is not what counsel might have done differently but rather
 13 whether counsel's decisions were reasonable from his perspective at the time. The reviewing
 14 court starts from a strong presumption that counsel's conduct fell within the wide range of
 15 reasonable conduct. On the prejudice prong, the petitioner must demonstrate a reasonable
 16 probability that, but for counsel's unprofessional errors, the result of the proceeding would
 17 have been different. *Beardslee v. Woodford*, 327 F.3d 799, 807-08 (9th Cir. 2003).

18 When evaluating claims of ineffective assistance of appellate counsel, the performance
 19 and prejudice prongs of the *Strickland* standard partially overlap. *Bailey v. Newland*, 263
 20 F.3d 1022, 1028-29 (9th Cir. 2001); *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989).
 21 Effective appellate advocacy requires weeding out weaker issues with less likelihood of
 22 success. The failure to present a weak issue on appeal neither falls below an objective
 23 standard of competence nor causes prejudice to the client for the same reason – because the
 24 omitted issue has little or no likelihood of success on appeal. *Id.*

25 The petitioner bears the burden of proving by a preponderance of the evidence that
 26 he is entitled to habeas relief. *Davis*, 333 F.3d at 991.

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Discussion

The court must apply the AEDPA standard of review to the state courts' "last reasoned decision" on the claim. See *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir.) (en banc), cert. denied, ___ U.S. ___, 128 S.Ct. 532, 169 L.Ed.2d 371 (2007). In this case, the Nevada Supreme Court's October 5, 2005, order of affirmance on the state post-conviction appeal constitutes the last reasoned decision of the state courts on Morgan's claim of ineffective assistance of appellate counsel. Accordingly, it is this decision that is reviewed herein.

The Nevada Supreme Court's rejection of the claim based upon the state district court's credibility finding at the suppression hearing was neither contrary to nor an unreasonable application of *Strickland*.

Petitioner contends that the State failed to carry its burden of demonstrating that Officer Stallcop had reasonable suspicion, grounded in specific and articulable facts, prior to the stop, that Morgan was engaged in the traffic violation of driving at night without the vehicle headlights on. However, Officer Stallcop quite clearly – and emphatically – testified, repeatedly, that no forward lights were illuminated on the vehicle when he observed the vehicle prior to the stop. This testimony, if found to be credible and in the absence of an effective rebuttal, carried the State's burden of demonstrating that the officer had a reasonable suspicion based upon specific and articulable facts that a traffic violation was being committed.

Petitioner suggests that Officer Stallcop's testimony was effectively rebutted and rendered implausible by the engineer's affidavits and the vehicle owner's manual establishing that the vehicle was equipped with daytime running lights when it was sold in 1997.

These materials did not render the officer's testimony necessarily implausible for two reasons.

First, the affidavits and manual spoke to the condition of the vehicle when it was sold in 1997, approximately four years prior to the traffic stop in February 2001. Neither the affidavits nor the original manual established that the daytime running light system still was functioning properly on that particular 1997 Samurai Sidekick Sport four years later when

1 Officer Stallcop testified, unequivocally, that he saw no forward white lights illuminated on the
2 vehicle on the evening of February 21, 2001.

3 Second, the daytime running light system, as originally installed and described in the
4 vehicle owner's manual, did not operate in exactly the manner in which Morgan testified.
5 Petitioner testified that the daytime running lights came on "as soon as you turn the car on."
6 The manual, in contrast, stated that the daytime running lights came on only if "all" of three
7 conditions were met, consisting of: "1. The engine is running. 2. The parking brake is
8 released. [and] 3. The light switch is at either the 'OFF' or the 'middle' position." Thus, even
9 if the daytime running light system still was functioning fully and properly on the four-year-old
10 vehicle, no forward lights would be illuminated on the vehicle if the driver failed to turn on the
11 headlights or failed to fully release the parking brake.

12 On the evidence presented at the suppression hearing, Officer Stallcop's testimony
13 was sufficient to carry the State's burden, and Morgan failed to establish that the officer's
14 testimony was necessarily implausible. Petitioner relied exclusively on the fact that the 1997
15 vehicle originally was equipped with daytime running lights four years prior to the stop, but that
16 fact did not establish that the running lights necessarily were illuminated at the time of the
17 stop on February 21, 2001. Petitioner cites no apposite and controlling federal or Nevada
18 state authority requiring the State, in this context, to provide further corroboration of the
19 officer's testimony that he did not observe any forward lights being illuminated on the vehicle
20 prior to the stop.³⁰ The fact that – under the defense's own evidence in the manual – the

³⁰The decisions in *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), and *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), both are inapposite. *Royer* held, *inter alia*, that the State has the burden to demonstrate that a seizure pursued on the basis of a reasonable suspicion was sufficiently limited in scope and duration. 460 U.S. at 500, 103 S.Ct. at 1326. No such issue as to the scope and duration of a seizure is presented here. *Dunaway* noted, *inter alia*, that the State has the burden of establishing that a confession was not obtained by exploitation of an illegal arrest. No such issue as to the admissibility of a confession is presented here. Neither *Royer* nor *Dunaway* establish that the State has the burden in this context to not only present testimony by its officer that no forward lights were illuminated but also to present particularized mechanical or other evidence regarding the specifics of operating the vehicle to buttress the officer's testimony that he in fact saw what he testified that he saw. In the present case, it was petitioner who brought up generalized mechanical and operational information.

(continued)

1 daytime running lights would not be illuminated if the parking brake had not been released --
2 in and of itself -- was sufficient to negate the defense suggestion that the mere existence of
3 the daytime running light system in the vehicle when sold necessarily rebutted Officer
4 Stallcop's testimony.

Morgan urges in the reply in this matter -- as state post-conviction counsel similarly urged for the first time on the state post-conviction appeal -- that the State failed to establish that the daytime running lights did not provide sufficient illumination to satisfy the requirements of N.R.S. 484.587. This argument, however, goes only to the alternative basis for decision in the state district court's post-conviction decision, that the stop would have been permissible even if the daytime running lights had been on because the illumination from the lights was insufficient for nighttime driving. Review under the AEDPA is directed to the last-reasoned decision in the state courts, which in this case is the Nevada Supreme Court's October 5, 2005 order of affirmance. It does not appear that the Nevada Supreme Court's last reasoned decision relied upon the state district court's alternative basis for decision on state post-conviction review that the illumination of the daytime running lights in any event would have been insufficient. The state high court instead based its decision upon the credibility determination made by the state district court at the suppression hearing that Morgan's testimony was not credible. The petitioner's argument regarding the illumination level of the daytime running lights – which were not on according to Officer Stallcop's testimony – thus begs the question vis-à-vis the basis for the Nevada Supreme Court's decision. If, as Officer Stallcop testified, no forward lights were on, then the illumination level of the daytime running lights clearly is not material.³¹

³¹This court further notes that the vehicle owner's manual indicated that the daytime running lights (continued...)

1 Accordingly, petitioner has failed to demonstrate a reasonable probability that the
2 outcome of the appeal would have been different if appellate counsel had pursued the issue
3 on direct appeal. The Nevada Supreme Court's holding that petitioner was not denied
4 effective assistance of appellate counsel therefore was neither contrary to nor an
5 unreasonable application of *Strickland*.

6 The sole remaining ground in the petition, ground 11, therefore does not provide a
7 basis for federal habeas relief.³²

8 IT THEREFORE IS ORDERED that the petition is DENIED on the merits and that this
9 action shall be DISMISSED with prejudice.

10 The clerk of court shall enter final judgment accordingly, in favor of respondents and
11 against petitioner, dismissing this action with prejudice.

12 || DATED: March 9, 2009.

James C. Mahan
JAMES C. MAHAN
United States District Judge

³¹(...continued)

were not to be used at night or at any other time when full illumination was required. Petitioner has not come forward with any apposite controlling authority establishing that the State's burden required that it affirmatively demonstrate at the time of the suppression hearing – in response to an argument that was not made at that time and that instead was made years later on state post-conviction review – that the daytime running lights provided sufficient illumination, despite the clear indication in the vehicles owner's manual that the running lights were not to be used at night.